

**BEFORE THE HEARING OFFICER
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

IN THE MATTER OF :)
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,)
)
 Petitioner)
)
and)
)
Fort Zumwalt R-II School District,)
)
 Respondent)

COVER SHEET

1. ("Student") is the daughter of alls ("Parents"). Student was born on.
2. At all times material to this due process proceeding, Student resided with her Parents and has attended Fort Zumwalt R-II School District, which is located in O'Fallon, Missouri ("District").
3. The Student and Parents were not represented in this matter.
4. The District was represented in this matter by Pete Yelkovac, Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C., 425 South Woods Mill Road, Suite 300, St. Louis, MO 63017.
5. The Parents filed an expedited due process Complaint with the Department of Elementary and Secondary Education ("DESE") on August 23, 2006, which was received by DESE that same day. The deadline for mailing the decision in this matter was September 22, 2006 or ten (10) school days following the hearing, whichever comes first.
6. On August 24, 2006, the Hearing Officer sent the Parent's Counsel a copy of the *Procedural Safeguards for Children and Parents*.
7. On August 24, 2006, the Hearing Officer set the Hearing in this matter for September 6, 2006. A copy of the Notice of Hearing was sent to the parties by regular mail and Federal Express overnight delivery. Service on the Parents was achieved on August 25, 2006.
8. The hearing in this matter was held on September 6, 2006, in the Administrative Offices of the District.

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**FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER**

The Hearing Officer, after conducting an expedited due process hearing in this matter on September 6, 2006, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

I. FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact:

A. The Parties

1. The Student attends school in the Fort Zumwalt R-II School District ("District"). At all times relevant to this due process proceeding, the Student has lived with her Parents who reside within the boundaries of the District. The primary mode of communication of the Student and Parents is written and spoken English.
2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. During school year 2005-2006 the District operated out of 23 educational buildings. During that school year, the District had an enrollment of slightly less than eighteen thousand five hundred (18,500) students. (*Missouri School Directory 2005-2006.*)
3. The Student and Parents were not represented during the processing of the due process complaint or at the hearing.
4. The District was represented in this matter by Pete Yelkovic, Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C., 425 South Woods Mill Road, Suite 300, St. Louis, MO 63017.

5. The Hearing Officer for the expedited due process proceeding was Ransom A Ellis, III.

6. During all times relevant to this proceeding the following persons were employed by the District, have provided educational services to the Student or have participated in the meetings which form a part of the issue in this case:

Dr. Bernard J. DuBray	Superintendent
Kim Carter	Assistant Superintendent -- Student Personnel Services
Richard Craven	Assistant Superintendent -- Special Services
Dr. Graham Weir	Principal -- Fort Zumwalt High School
Eric Gough	Assistant Principal -- Fort Zumwalt High School
Liz Riedemann	Emotional Diagnostician
Karla Smith	School Psychological Examiner
Jan Davis	Counselor
Nato Popp	Crisis Counselor
Nina Abercrombie	PAS Counselor
Rhonda Fitzgerald	Special Education Teacher
Cherie Stanley	Special Education Teacher
Debbie Korte	Regular Education Teacher
Georgia Klautzer	Regular Education Teacher
Linda Burke	Regular Education Teacher
Seth Wilbur	Regular Education Teacher
Kyle Yount	Regular Education Teacher
Deanna Seib	Regular Education Teacher
Pat Fitzgerald	School Resource Officer

B. Procedural Background

7. The Parents filed an expedited due process Complaint with the Department of Elementary and Secondary Education ("DESE") on August 23, 2006, which was received by DESE that same day. (HO Exh 1). The deadline for mailing the decision in this matter was September 22, 2006 or ten (10) school days following the hearing, whichever comes first.

8. On or about August 23, 2006 Ms. Margaret Strecker notified the Hearing Officer (HO Exh 2) that he had been selected to serve as the Hearing Officer for the expedited due process complaint.

9. On August 24, 2006, the Hearing Officer sent the Parents a copy of the *Procedural Safeguards for Children and Parents*.

10. On August 24, 2006, the Hearing Officer set the hearing in this matter for September 6, 2006. A copy of the Notice of Hearing was sent to the parties by regular mail. A second copy of

the Notice of Hearing was sent to the Parents by Federal Express overnight delivery and was delivered to the Parents on August 25, 2006. (HO Exh 5)

11. On August 30, 2006, Counsel for the District filed a Motion to Dismiss the Due Process Complaint. (HO Exh 6). The Hearing Officer did not rule on the Motion and, instead, elected to consider the issues and arguments raised in the Motion with the case.

12. The hearing in this matter was held on September 6, 2006 in the District's Administrative Offices in O'Fallon, Missouri. Neither the Parents nor the Student appeared for the hearing. The start of the hearing was delayed to determine if the Parents were going to make an appearance. When the Parents did not appear, or call to notify that they had been delayed, the hearing began and evidence was taken from the District's witnesses.

13. During the hearing, the following exhibits were identified and admitted as evidence in this proceeding: District Exhibits A through I and Hearing Officer Exhibits 1 through 6.

C. Time Line Information

14. The Parents filed an expedited due process Complaint with the Department of Elementary and Secondary Education ("DESE") on August 23, 2006, which was received by DESE that same day. (HO Exh 1). The deadline for mailing the decision in this matter was September 22, 2006, or ten (10) school days following the hearing, whichever comes first.

15. On August 24, 2006, the Hearing Officer set the hearing in this matter for September 6, 2006. A copy of the Notice of Hearing was sent to the parties by regular mail. A second copy of the Notice of Hearing was sent to the Parents by Federal Express overnight delivery and was delivered to the Parents on August 25, 2006.

16. The hearing in this matter was held on September 6, 2006 in the District's Administrative Offices in O'Fallon, Missouri.

D. The Issue

17. The following issue was presented to the Hearing Officer:

Whether the District appropriately determined that the Student's conduct, which violated the District's Disciplinary Code, was not a manifestation of her educational disability.

E. Background Facts

18. On February 16, 2005, the Student's Multi-Disciplinary Team educationally diagnosed the Student as having a Language Impairment in the areas of semantics and pragmatics. (Dist Exh D, pp. 25-37). The Multi-Disciplinary team found that:

"[The Student's] significant language deficits markedly impact her school functioning due to difficulty with word relationships (comparisons, time relationships, serial order), critical thinking skills, interpreting skills and formulating grammatically and semantically meaningful sentences."

(Dist Exh D. p. 28).

19. On February 21, 2006, the Student's Individualized Education Program ("IEP") team met in an annual meeting to develop the Student's IEP for the period February 22, 2006 through February 21, 2007. (Dist Exh B, p. 2). Present at the meeting were the Parents, the Student, Karla Smith, Rhonda Fitzgerald and Ms. Porter, a regular education teacher with the District. (Dist Exh B, p. 2). The Student's IEP team determined that the Student should receive appropriate special education and related services and be placed Outside the Regular Class 21% to 60% of the time. (Dist Exh B, p. 13). The IEP team also determined that the Student was not eligible for Extended School Year Services. (Dist Exh B, p. 5). The Parents were in agreement with the Student's IEP.

20. During the Summer of 2006, the District offered summer school classes to students who wished to receive "enrichment" and to students who wished to take or retake classes. Two sessions were scheduled, one eleven (11) school day session during June and one eleven (11) school day session during July.

21. The classes were held at Fort Zumwalt High School. No special education services were offered to the Student by the District. However, Cherie Stanley, a Special Education Teacher with the District was available to assist the Student upon request. During the June session, the Student was in Debbie Korte's class. The Student's attendance in the summer school program was optional and not required. The record does not indicate whether the Student was enrolled in a "graded" course during the summer school session, or was merely taking the classes on a non-graded, enrichment basis only.

22. On June 15, 2006, a student in Ms. Korte's Art class reported that his I-pod had been taken from his desk during a break period. An investigation was initially conducted by Ms. Korte. She reported the matter to Assistant Principal Eric Gough. Mr. Gough interviewed the Student and others with School Resource Officer Pat Fitzgerald. During the interview with the Student, she admitted that she took the I-pod and stated that when Ms. Korte had raised the issue of the missing I-pod in the classroom, she had asked to be excused and discarded the I-pod in a bathroom trash can. The undamaged I-pod was found by Mr. Fitzgerald in the bathroom trash can. (Dist Exh F, pp.47-49).

23. Prior to June 15, 2006, during school year 2005-06, the Student had not received an out-of-school suspension from the District.

24. The Student's conduct constituted a violation of the District's disciplinary policies, which are applied to all students enrolled in the District. On June 15, 2006, the Student was suspended by Mr. Gough for ten (10) school days for theft. On June 19, 2006, Mr. Gough sent a letter to the Student's Parents. (Dist Exh F, p. 46). The letter informed the Parents that the Student had been:

"suspended from school for a period of ten (10) days because of theft and has been referred to the Superintendent for further action . . . This suspension shall include nine (9) days from the first summer school session, June 15, 2006 to June 29, 2006 and one (1) day, August 24, 2006 from the first semester of the 2006-2007 school year. . ."

(Dist Exh F, p. 46).

25. Within ten (10) days of the beginning of the Student's suspension, on June 21, 2006, the Student's IEP team met to review the Student's June 15, 2006 conduct and determine whether such conduct was a manifestation of the educational disability -- Language Impairment. Present at the manifestation determination meeting were the Student's IEP Team, which consisted of the Parents, Liz Riedemann, Seth Wilbur and Eric Gough. (Dist Exh E, pp. 38-43). During the meeting, the IEP team reviewed: (1) all relevant information in the Student's file; (2) the Student's IEP; (3) Observations made by teachers that were relevant to the conduct of the Student; and, (4) relevant information provided by the Parents. (Dist Exh E, p. 42).

26. The Student's IEP team, including the Parents, determined that the Student's conduct was not the direct result of the District's failure to implement the Student's IEP.

27. The Student's IEP team determined that the Student's conduct was not caused by, and/or did not have a direct and substantial relationship to the Student's educational disability of Language Impairment. The Parents disagreed with this determination arguing that the Student's disability impacted on the Student's ability to comprehend the nature of her actions. (Dist Exh E, pp. 39-40). The review of the Student's disability conducted by the Student's IEP team during the manifestation determination meeting revealed that part of the Student's educational disability involved a language based difficulty with critical thinking and problem solving skills related to mathematics. However, the Student's IEP Team determined that these critical thinking and problem solving skills did not impact on the Student's ability to understand right from wrong and therefore found that the Student's conduct on June 15, 2006, was not a manifestation of her educational disability.

28. On June 22, 2006, Dr. Bernard DuBray, the District's Superintendent, wrote the Student's Parents to inform them that he had decided to extend the Student's suspension. Dr. DuBray stated in this letter:

"Because of the seriousness of this incident, I find it necessary to suspend [the Student] for an additional twenty (20) days of school above those assigned by the building principal. this suspension shall extend from August 25, 2006 through September 22, 2006 unless extended because of any unanticipated school closing such as inclement weather or emergencies. . . Since [the Student] receives special education services, make-up privileges will be provided."

(Dist Exh F, pp. 44-45). The letter also informed the Parents that the District's Community Service Option was available to the Student. This Option allows suspended students the opportunity to participate in community service projects and reduce the length of their suspensions. (Dist Exh F, p. 45).

29. During school year 2005-06, the Student was suspended out-of-school for a total of nine (9) school days, if the "optional" or "enrichment" days during the first summer school session are considered to be "school days."

30. During school year 2006-07, the Student was suspended out-of-school on five (5) school days -- August 24, 25, 28, 29 and 30. The Student took advantage of the District's Community Service Option and returned to school on August 31, 2006. The Parents have not appealed the decision of the District's Superintendent to extend the Student's suspension beyond the Principal's ten (10) school day suspension pursuant to Section 167.171 RSMo.

II. CONCLUSIONS OF LAW

31. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.

32. The Student resides with her Parents and is now, and has been a resident of the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo.

33. The Individuals with Disabilities Act, 20 U.S.C. §1411 *et seq.* ("IDEA"), its regulations, 34 C.F.R. Part 300 and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2004), ("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

34. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with

disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

35. Since on or about February 16, 2005, the Student has been considered by the District to be a "child with a disability" as that term is defined in the IDEA Regulations at 34 C.F.R. §300.7 and the State Plan.

36. The purpose of the IDEA and its regulations is: (1) "to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs"; (2) "to ensure that the rights of children with disabilities and their parents are protected"; and, (3) "to assess and ensure the effectiveness of efforts to educate those children." 34 C.F.R. § 300.1.

37. The relevant portions of the IDEA that define the law with respect to suspensions of students with disabilities are set forth at 20 U.S.C. §1415(k)(1) and state, in pertinent part, as follows:

" . . .

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting. . . .

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant

information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine --

- (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or,
- (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) **Manifestation**

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

38. The IDEA, 20 U.S.C. §1415(k)(3) sets forth the parents' right to file a due process complaint regarding any decision regarding placement or the manifestation determination and states, in pertinent part, as follows:

"(A) **In general**

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) **Authority of hearing officer**

(i) **In general**

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) **Change of placement order**

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer, may --

- (I) return a child with a disability to the placement from which the child was removed; or
- (II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others."

39. The IDEA, 20 U.S.C. §1415(k)(4) sets forth the placement locations during the due process appeal and states, in pertinent part, as follows:

"When an appeal under paragraph (3) has been requested by either the parent or the local educational agency --

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing."

40. The IDEA Regulations, 34 C.F.R. §300.519 set forth the regulations governing changes of placement for disciplinary removals. This regulation states:

"§300.519 Change of placement for disciplinary removals.

For purposes of removals of a child with a disability from the child's current educational placement under §§300.520--300.529, a change of placement occurs if --

(a) The removal is for more than 10 consecutive school days; or,

(b) The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another."

41. The IDEA Regulations, 34 C.F.R. §300.523 sets forth the regulations regarding the manifestation determination review. This section of the regulations states:

"§300.523 Manifestation determination review.

(a) General. If an action is contemplated regarding behavior described in §§300.520(a)(2) or 300.521, or involving a removal that constitutes a change of placement under §300.519 for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the LEA that applies to all children--

(1) Not later than the date on which the decision to take that action is made, the parents must be notified of that decision and provided the procedural safeguards notice described in §300.504; and

(2) Immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review

must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(b) Individuals to carry out review. A review described in paragraph (a) of this section must be conducted by the IEP team and other qualified personnel in a meeting.

(c) Conduct of review. In carrying out a review described in paragraph (a) of this section, the IEP team and other qualified personnel may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team and other qualified personnel--

(1) First consider, in terms of the behavior subject to disciplinary action, all relevant information, including --

(i) Evaluation and diagnostic results, including the results or other relevant information supplied by the parents of the child;

(ii) Observations of the child; and

(iii) The child's IEP and placement; and

(2) Then determine that--

(i) In relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(ii) The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(iii) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(d) Decision. If the IEP team and other qualified personnel determine that any of the standards in paragraph (c)(2) of this section were not met, the behavior must be considered a manifestation of the child's disability.

(e) Meeting. The review described in paragraph (a) of this section may be conducted at the same IEP meeting that is convened under § 300.520(b).

(f) Deficiencies in IEP or placement. If, in the review in paragraphs (b) and (c) of this section, a public agency identifies deficiencies in the child's IEP or placement or in their implementation, it must take immediate steps to remedy those deficiencies."

42. The IDEA Regulations, 34 C.F.R. §300.524 sets forth the regulations regarding what occurs when the manifestation determination reveals that the student's behavior was not a manifestation of his/her disability. This section of the regulations states:

"§300.524 Determination that behavior was not manifestation of disability.

(a) General. If the result of the review described in §300.523 is a determination, consistent with §300.523(d), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in §300.121(d).

(b) Additional requirement. If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(c) Child's status during due process proceedings. Except as provided in §300.526, §300.514 applies if a parent requests a hearing to challenge a determination, made through the review described in §300.523, that the behavior of the child was not a manifestation of the child's disability."

43. The IDEA Regulations, 34 C.F.R. §300.525 sets forth the regulations regarding the right of a Parent to file an appeal to the determination that the child's behavior was not a manifestation of his/her disability. This section of the regulations states:

"§300.525 Parent appeal.

(a) General.

(1) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement under §§300.520-300.528, the parent may request a hearing.

(2) The State or local educational agency shall arrange for an expedited hearing in any case described in paragraph (a)(1) of this section if a hearing is requested by a parent.

(b) Review of decision.

(1) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements of §300.523(d).

(2) In reviewing a decision under §300.520(a)(2) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards in §300.521."

44. The DESE regulations regarding summer school programs are set forth at 5 C.F.R. 50-340.050, *Policies and Standards for Summer School Programs*, these regulations state in pertinent part as follows:

"(1) Summer school programs may be held any time between the close of the regular school term and the beginning of the next regular term and must be approved by the local school board. A summer school program shall consist of a planned schedule of course offerings for resident students at the elementary or high school level. An approved summer school program for non-handicapped students must be in session for at least one hundred twenty (120) clock hours. Summer school programs for handicapped students must be in session for at least sixty (60) clock hours depending upon the hours needed to comply with the Individual Education Program (IEP).

(2) A school board may authorize the operation of summer school programs at the elementary or high school level, or both. Each approved summer school program shall have at least the required minimum clock hours of instruction. An elementary summer school program may include any combination of grades kindergarten through eight (K-8). A high school summer school program may include any combination of grades seven through twelve (7-12). Elementary and high school summer school programs may not be combined to meet the minimum clock-hour requirement. A school district may operate one (1) or more summer school programs at any level. Each summer school program that is operated separately with different opening and closing dates must meet the minimum clock hours of instruction requirements.

(3) The curriculum in an approved summer school program at any level must include one (1) or more of the following academic areas as the major portion of the clock hours of instruction in the program: elementary school--language arts, mathematics, science, social studies; and high school -- language arts, mathematics, science, social studies, practical arts. . . .

(A) Any course which may be offered in the regular school term may be approved as part of the summer school program. Special approval must be requested for summer school courses that would require special approval during the regular term.

(B) The following are examples of courses which may be approved as part of the summer school program but must be in addition to, and not in place of, the academic areas: driver education, art, crafts, physical education and music. . . .

(4) The attendance of resident pupils between the ages of six and twenty (6 20) in grades one through twelve (1-12) and pupils five (5) years old attending kindergarten in approved summer school programs may be counted for summer school state aid purposes in accordance with section 163.011, RSMo. . . .

(6) Some high school courses may be offered for credit and some courses for no credit in an approved summer school program. High school pupils may earn one-half ($\frac{1}{2}$) unit of high school credit for laboratory courses which meet at least seventy-five (75) clock hours and one-half ($\frac{1}{2}$) unit of high school credit for other courses which meet for sixty to seventy-five (60 75) clock hours. One-fourth ($\frac{1}{4}$) unit of high school credit may be granted for driver education classes which provide thirty (30) clock hours of classroom instruction, six (6) clock hours behind the wheel and twelve (12) clock hours as an observer in a driver education car. Minimum time requirements exclude any passing time, break time and lunch time. . . .

(14) Local school districts must keep individual pupil membership and attendance records for summer school programs. The summer school records shall be audited as required by law."

45. In Missouri, a "school year" commences on the first day of July and ends on the thirtieth day of June of the next year. See Section 160.041.1 RSMo

46. The Student's Parents appealed the IEP Team's manifestation determination by filing an expedited due process Complaint with DESE on August 23, 2006. A hearing was held at the Administrative Offices on September 6, 2006 which was the tenth school day following the filing of the expedited due process complaint. The timing of the hearing in this matter was in compliance with the IDEA, 20 U.S.C. §1415(k)(4).

47. The Parents filed the expedited Due Process Complaint. At the hearing, the Parents bore the burden of going forward and the burden of proof to demonstrate that the manifestation determination was inappropriate or incorrect. The Parents also bore the burden of proof on the issue of whether the Student sustained a change of placement as a result of her disciplinary

suspension in June and August, 2006. The Parents did not appear for the hearing or present evidence, other than the Due Process Complaint which was filed with DESE on August 23, 2006. Accordingly, the Parents have failed to meet their burden of proof to demonstrate that a violation of the IDEA, its Regulations or the State Plan has occurred.

48. A legal question exists concerning whether the days spent by the Student in the District's 2006 Summer School program constitute "school days" for purposes of the question of whether she has sustained a change of placement. The Student's IEP did not require the District to provide the Student with Extended School Year Services, but the record does not indicate whether the student was enrolled and taking the summer classes for a grade or credit, or on an optional, non-graded, enrichment basis. Since the ultimate decision in this case does not turn on the question of whether the District changed the Student's educational placement, it will be assumed for purposes of this Decision, without deciding, that the 2006 Summer School program constituted "school days" for purposes of the question of whether the Student has sustained a change of placement.

49. During school year 2005-06, the Student received out-of-school suspensions for nine school days, all during the Summer 2006 program (June 15 through June 29). The District did not change the Student's placement during school year 2005-06 by suspending her nine (9) school days from June 15, 2006 through June 29, 2006 in that the disciplinary removal was not for more than ten (10) consecutive school days and/or did not constitute a pattern of removals that accumulated to more than ten (10) school days in a school year. See: 20 U.S.C. §1415(k)(1)(C) and 34 C.F.R. §300.519.

50. The Student was suspended by the Principal for ten (10) school days on June 15, 2006. The Student's Parents were notified of the disciplinary action and six (6) calendar days after the suspension was imposed, on June 21, 2006, the Student's IEP team met to review the Student's conduct and conduct a manifestation determination. The actions of the District in this regard complied with the IDEA, its regulations, 34 C.F.R. §300.523(a) and (b) and the State Plan.

51. During the Student's June 21, 2006, Manifestation Determination meeting:

A. The Student's IEP Team considered, in terms of the Student's June 15th behavior, all relevant information including the Student's evaluation and diagnostic results, relevant information provided by the Student's Parents, relevant observations of the Student, the Student's IEP and the placement contained therein;

B. The Student's IEP Team determined that in relationship to the Student's June 15th behavior, her IEP and placement remained appropriate and the special education and related services, including behavior intervention strategies were consistent with the Student's IEP and placement;

C. The Student's IEP Team determined that the Student's educational disability (Language Impaired) did not impair the ability of the Student to understand the impact and consequences of the behavior which was the subject of the June 15, 2006 suspension; and,

D. The Student's IEP Team determined that the Student's educational disability (Language Impaired) did not impair the ability of the Student to control the behavior which was the subject of the June 15, 2006 suspension.

The determinations, considerations and actions of the Student's IEP Team and the District described above in this paragraph were appropriate and, were in compliance with the IDEA and its regulations, 34 C.F.R. §300.523(c) through (f) and the State Plan.

52. The conduct of the Student on June 15, 2006, that resulted in her suspension that day, was not a manifestation of her educational disability, Language Impaired.

53. Since the conduct of the Student that resulted in her suspension on June 15, 2006, was not a manifestation of her educational disability, the District's application of the relevant disciplinary procedures that were applicable to all other District students, was appropriate. In particular, the decision of the District's Superintendent on June 22, 2006, to extend the Student's suspension for an additional twenty (20) school days was in compliance with the IDEA regulations, 34 C.F.R. §300.524 and the State Plan.

54. During school year 2006-07, the Student was suspended out-of-school on five (5) school days -- on August 24, 25, 28, 29 and 30. The Student took advantage of the District Community Service Option and returned to school on August 31, 2006. The District did not change the Student's placement during school year 2006-07 by suspending her five (5) school days from August 24 through August 30, in that the disciplinary removal was not for more than ten (10) consecutive school days and/or did not constitute a pattern of removals that accumulated to more than ten (10) school days in a school year. See: 20 U.S.C. §1415(k)(1)(C) and 34 C.F.R. §300.519. Furthermore, since the Student's June 15, 2006 conduct was not a manifestation of her educational disability, the suspension days do not count for purposes of determining whether a change of placement has occurred during this school year.

55. Even if the Student's conduct was a manifestation of her educational disability, which it was not, the District did not change the Student's placement during either school year in that the disciplinary removals in each school year were not for more than ten (10) consecutive school days and/or did not constitute a pattern of removals that accumulated to more than ten (10) school days in a school year. See: 20 U.S.C. §1415(k)(1)(C) and 34 C.F.R. §300.519.

56. To the extent that it is required by the facts in this case and the issues presented to the Hearing Officer, during all times relevant to this Due Process Complaint, the District's actions with respect to the Student and her Parents have met the procedural requirements of the IDEA

and State Plan. To the extent that a question arises with respect to any procedural due process requirement relevant to this Due Process Complaint, there is no competent evidence on the record that any such alleged procedural inadequacy impeded the Student's right to FAPE; significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of FAPE for the Student; or, caused a deprivation of educational benefits for the Student.

III. DECISION

Issue: Whether the District appropriately determined that the Student's conduct, which violated the District's Disciplinary Code, was not a manifestation of her educational disability.

In February, 2005, the Student was educationally diagnosed as having a language impairment. Her language impairment impacts on her school functioning due to difficulty with word relationships (comparisons, time relationships, serial order), critical thinking skills, interpreting skills and formulating grammatically and semantically meaningful sentences. Her language impairment does not have an effect on the Student's ability to determine right from wrong.

In February, 2005, and again in 2006, an IEP was prepared for the Student by her IEP Team, which included her Parents. The Student's most recent IEP indicates that the Student does not need extended school year services.

During the District's 2006 Summer School Program, the Student was enrolled in an enrichment course. While a District special education teacher "checked in" with her, the Student did not receive special education services during the Summer School Program.

On June 15, 2006, a student in the class the Student was taking, reported that his I-pod had been taken from his desk during a break period. An investigation was initially conducted by the classroom teacher who then reported the matter to Assistant Principal Eric Gough. Mr. Gough, with the assistance of School Resource Officer Pat Fitzgerald, interviewed several students, including the Student. During the interview with the Student, she admitted that she took the I-pod and, further stated that when the classroom teacher asked about the missing I-pod, she asked to be excused and discarded the I-pod in a bathroom trash can. The undamaged I-pod was found by Mr. Fitzgerald in the bathroom trash can described by the Student.

The District determined that the Student's conduct constituted "theft" -- a violation of the District's disciplinary policies. On June 15, 2006, the Student was suspended by Mr. Gough for ten (10) school days for theft. On June 19, 2006, Mr. Gough sent a letter to the Student's Parents which informed them that the Student had been:

"suspended from school for a period of ten (10) days because of theft and has been referred to the Superintendent for further action . . . This suspension shall include nine (9) days from the first summer school session, June 15, 2006 to June 29, 2006 and one (1) day, August 24, 2006 from the first semester of the 2006-2007 school year. . ."

On June 21, 2006, the Student's IEP team met to conduct a manifestation determination. During the manifestation determination, the Student's IEP team reviewed all relevant information in the Student's file; the Student's IEP; observations made by teachers that were relevant to the conduct of the Student; and, relevant information provided by the Parents. The Student's IEP team, including the Parents, determined that the Student's conduct was not the direct result of the District's failure to implement the Student's IEP. The team also determined that the Student's conduct was not caused by and/or did not have a direct and substantial relationship to the Student's educational disability of language impairment. The Parents disagreed with this determination arguing that the Student's disability impacted on her ability to comprehend the nature of her actions. The review of the Student's disability conducted by the Student's IEP team revealed that while the Student's educational disability involved, in part, critical thinking and problem solving skills related to mathematics issues, her educational disability did not impact on her ability to understand right from wrong.

The conduct of the Student on June 15, 2006, that resulted in her suspension that day, was not a manifestation of her educational disability, language impaired. The determinations, considerations and actions that the Student's IEP Team made during the manifestation determination were appropriate and were in compliance with the IDEA and its regulations, 34 C.F.R. §300.523(c) through (f) and the State Plan. Since the Student's conduct was not a manifestation of her educational disability, the District was free to discipline the student in a manner that was consistent with the disciplinary penalties that were normally applied to non-disabled students.

On June 22, 2006, Dr. Bernard DuBray, the District's Superintendent, wrote the Student's Parents to inform them that he had decided to extend the Student's suspension. Dr. DuBray stated in this letter:

"Because of the seriousness of this incident, I find it necessary to suspend [the Student] for an additional twenty (20) days of school above those assigned by the building principal. this suspension shall extend from August 25, 2006 through September 22, 2006 unless extended because of any unanticipated school closing such as inclement weather or emergencies. . . Since [the Student] receives special education services, make-up privileges will be provided."

The letter also informed the Parents that the District's Community Service Option was available to the Student. This Option allows suspended students the opportunity to participate in community service projects and reduce the length of their suspensions.

During school year 2005-06, the Student was suspended out-of-school for a total of nine (9) school days, if the "optional" or "enrichment" days during the first summer school session are considered to be "school days." The IDEA regulations state that a "change of placement" for a child with a disability occurs when: (1) "the removal is for more than 10 consecutive school days; or, (2) the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another." See: 34 C.F.R. §300.519.

In Missouri, a "school year" is defined as the period starting with July 1 and ending with the following June 30. The time period in question in this case encompasses two school years. The Student did not sustain a "change of placement" due to the disciplinary suspension in question here in either school year. More specifically:

- A. During school year 2005-06, the Student received out-of-school suspensions for nine school days, all during the Summer 2006 program (June 15 through June 29);
- B. During school year 2006-07, the Student was suspended out-of-school on five (5) school days -- on August 24, 25, 28, 29 and 30. The Student took advantage of the District Community Service Option and returned to school on August 31, 2006.

Even if the Student's conduct was a manifestation of her educational disability, which it was not, the District did not change the Student's placement during either school year in that the disciplinary removals in each school year were not for more than ten (10) consecutive school days and/or did not constitute a pattern of removals that accumulated to more than ten (10) school days in a school year. See: 20 U.S.C. §1415(k)(1)(C) and 34 C.F.R. §300.519.

IV. ORDER

It is hereby ordered that the Due Process Complaint filed by the Student's Parents on or about August 23, 2006, is hereby dismissed.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to Section 162.962 RSMo. Specifically, you may request review by filing a petition in a state or federal court of competent jurisdiction within forty-five (45) days after the receipt of this final decision. Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. §300.512, and in the Procedural Safeguards which were provided to you at the beginning of this matter.

Ransom A Ellis, III
Hearing Officer

Dated: September 19, 2006

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon each party to this action, to-wit:

Parent

Mr. Peter Yelkovac
Tueth, Keeney, Cooper, Mohan
& Jackstadt, P.C.
425 S. Woods Mill Road, Suite 300
Chesterfield, MO 63017

Margaret Strecker
Special Education Legal Services
Department of Elementary and
Secondary Education
Post Office Box 480
Jefferson City, MO 65102-0480

by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said parties on this 19th day of September, .

Ransom A Ellis, III
Hearing Officer